The Constitutionalisation of Immigration Detention: Between EU Law and the European Convention on Human Rights

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By Galina Cornelisse

Abstract: This GDP Working Paper argues that the increasing regulation of immigration detention in European Union law has led to more constitutional protection for immigration detainees. This *constitutionalisation* has resulted in part from the dynamics between EU law and European human rights law. The complementary relationship between the two legal orders may also contribute to higher standards of protection for immigration detainees. However, denser regulation on the transnational level has at times also resulted in inconsistency, with negative implications for the rights of immigration detainees in Europe. The author concludes that the path towards constitutionalisation is not an inevitable one. It will require constant vigilance and can be encouraged by effective litigation.

1. Introduction

Not very long ago the use of detention in immigration and asylum procedures in the European Union (EU) was an issue that was left largely to the discretion of individual Member States, even if states' laws and policies had to conform to the standards laid down in relevant international law and in particular the European Convention on Human Rights (ECHR).[1] Thus, until 2008, detention was only mentioned in two EU legal instruments concerning immigration and asylum law—namely, the early versions of the directives on asylum procedures and reception conditions.[2] These instruments did little more than mention detention: They stipulated that asylum seekers could not be detained for the sole reason that they were asylum seekers and that habeas corpus proceedings were required in very general terms only. As a result, the precise conditions for the lawfulness of detention measures were left to domestic legislators.

Since 2008, however, the number of EU legal instruments that regulate detention in the context of immigration and asylum procedures has proliferated rapidly: Currently EU law covers almost all forms of detention in this particular area. Thus, the Return Directive (RD), an instrument that sets common standards for return procedures in the Member States, sets limits on the use of detention in expulsion procedures[3]; the recast Asylum Procedures Directive (recast APD) and Reception Conditions

[1] European Convention on Human rights, CETS No. 005, 4 Nov. 1950 (entry onto force: 3 Sep. 1953).
[2] Article 18 of Directive 2005/83/EC of 1 December 2005 on minimum standards on procedures in Member States for granting and withdrawing refugee status [2005] OJ L O326/13 (APD); and Article 7 of Directive 2003/9/EC of 27 January 2003 laying down minimum standards for the reception of asylum seekers [2003] OJ L 31/18 (RCD).
[3] Directive 2008/115 of the European Parliament and the Council on common standards and procedures in Member states for returning illegally staying third-country nationals [2008] OJ L 348/98 (Return Directive)

Directive (recast RCD) regulate detention in asylum procedures[4]; and the Dublin Regulation does the same cases concerning third-country nationals.[5] All these instruments require that detention be a proportionate measure and only be resorted to after the consideration of individual circumstances, which is in line with the Charter of Fundamental Rights of the European Union.[6]

This paper argues that the regulation of immigration detention in EU law has resulted in the *constitutionalisation* of this measure, at least to an extent that the ECHR has failed to attain. I use the term constitionalisation to denote a trend towards fuller recognition in law of the fact that the exercise of migration control by the state impinges on the rights of individuals. The paper also demonstrates that this constitutionalisation has also resulted from the complementary dynamics between EU law (so-called supranational law) and European human rights law, and that such complementarity may also contribute to higher standards of protection for immigration detainees. Nevertheless, denser regulation on the transnational level has on a few occasions led to inconsistencies, mainly due to the fact that the European Court of Justice (ECJ)—the court overlooking the application and interpretation of EU law—has overlooked important aspects of the European Court of Human Rights (ECtHR) case law.

The paper sets the stage by describing the current EU legal framework regulating immigration detention (section 2) and the case law of the ECJ in this field (section 3). With some important exceptions, EU law seems to have more teeth when it comes to offering constitutional guarantees to immigration detainees than the ECHR—a claim that is supported by looking at the impact of EU law on the law and practice of one Member State in particular, the Netherlands (section 4). The focus in section 4 is on the case law of the Dutch Council of State, the highest court hearing immigration cases in the Netherlands. The paper then briefly addresses some areas in which the legal guarantees derived from EU law and from the ECHR may complement each other. However, by focusing on a recent case by the ECJ, the paper argues that complementarity should not be taken for granted (section 5). In the conclusion (section 6), I touch upon some of the difficulties the future may bring concerning European regulations in this area, arguing that the path towards constitutionalisation is not an inevitable one but requires constant vigilance.

[4] Directive 2013/32 of the European Parliament and of the Council of 26 June 2013 on common procedures for granting and withdrawing international protection [2013] OJ L 180/60 (Recast APD), and Directive 2013/33 of the European Parliament and of the Council of 26 June 2013 laying down common standards for the reception of applicants for international protection [2013] OJ L 180/96 (Recast RCD).
[5] Regulation (EU) No. 604/2013 of the European Parliament and of the Council of 26 June 2013 establishing the criteria and mechanisms for determining the Member State responsible for examining an application for international protection lodged in one of the Member States by a third-country national or a stateless person (recast) [2013] OJ L 180/31 (Dublin III).
[6] See Articles 6 and 52 of the Charter of Fundamental Rights of the European Union [2000] OJ C 364/1.

2. EU legal instruments and immigration detention

EU law on immigration detention has originated from two distinct EU policy venues: the common policy on asylum which aims at "offering appropriate status to any third-country national requiring international protection and ensuring compliance with the principle of non-refoulement"[7]; and the EU's common immigration policy, which aims at ensuring *inter alia* "the prevention of, and enhanced measures to combat, illegal immigration."[8]

The first EU legal instrument to regulate the use of detention in a substantial way sprouted from the second policy venue: the Return Directive, which was adopted in 2008 and had to be implemented by the Member States by December 2010. The Return Directive aims to harmonize the rules applicable to third-country nationals who are unlawfully present in the Member States, but it was also meant to strengthen the efforts by the EU to return these individuals to their countries of origin.[9] The ECJ has affirmed this latter objective by underlining in its case law on the Return Directive the importance of an *effective* removal policy.[10] Thus, Member States are obliged to issue a return decision to third country-nationals illegally staying on their territory.[11] As a general rule, the return decision provides for a period of seven days during which the third-country national can depart voluntary. Illegally staying third-country nationals, who have not departed voluntarily after they have been issued a return decision, may be removed.[12] Article 15 of the Directive regulates detention for the purpose of removal. Member States are authorised to detain a third-country national who is the subject of return procedures in order to prepare the return and/or carry out the removal process, unless "*other sufficient but less coercive measures can be applied effectively in a specific case.*"

The requirement that states consider less coercive measures and only resort to detention if lighter measures would not suffice is called the principle of proportionality. Detention can be applied in particular if there is a risk of absconding or when the third-country national avoids or hampers return or removal. In addition, detention shall last for as short a period as possible and only maintained as long as removal arrangements are in progress and executed with due diligence. Six months is the maximum period during which a third-country national can be detained, which can be prolonged with a further twelve months if removal has not been carried out because the necessary papers are lacking or because of lack of cooperation of either the third-country national concerned or his country of origin. Article 15 also prescribes a speedy judicial review of the lawfulness of the detention if administrative authorities have ordered the measure, either automatically or upon the request of the third-country national concerned.

[7] The principle of non-refoulement is a legal principle that prohibits the sending back of individuals to a country where they would be subject to torture, or inhuman or degrading treatment.
[8] Article 78 and 79 Consolidated Version of the Treaty on the Functioning of the European Union [2012] OJ C 326/47 (TFEU).
[9] See Recital 2 Return Directive.
[10] Case C-601/15 PPU, *J.N*, 15 February 2016; and Case C-61/11 PPU, *El Dridi*, 28 April 2011, para 59, Case C-329/11, *Achughbabian*, 6 December 2011, paras 43 and 45, and Case C-430/11, *Sagor*, 6 December 2012.
[11] Article 6 Return Directive and Case C-38/14 *Zaizoune*, 23 April 2015, para 32.
[12] Art. 8 Return Directive.

EU asylum law did not govern detention in a substantial way until the second phase of the Common European Asylum System (CEAS), which entailed the redrafting of the Reception Conditions Directive (RCD), the Asylum Procedures Directive (APD), and the Dublin Regulation. All these instruments determine that asylum seekers may not be detained for the sole reason that they are applying for international protection, and they require conformity with Article 31 of 1951 Refugee Convention.[13]

The first instrument of the second phase of CEAS to enter in force (in July 2013) was the recast Dublin Regulation (Dublin III). Dublin III aims to ensure that only one Member State is responsible for examining an asylum application, and it sets down a number of criteria to determine which Member State that should be, together with detailed arrangements for the transfer of asylum seekers from one Member State to another. Detention may be used only *in order to secure a transfer procedure*, when there is a *significant risk of absconding*.[14] The assumption that a risk of absconding exists has to be individually justified, and based upon objective criteria defined by national law.[15] Member States may only detain a person on the basis of an individual assessment, and only so far as it is proportionate measure, and no other, less coercive measures can be applied.[16] Dublin III also governs the duration of detention: it shall be as short as possible and no longer than the time reasonably necessary to fulfill the required procedures with due diligence until the transfer is carried out. Further time limits specify that detention under Dublin III may in no case last longer than 12 weeks.[17] The Regulation declares the Recast RCD applicable as regards the conditions and guarantees applicable to detained persons, as such including the right to a speedy judicial review of the detention, a guarantee that is also contained in Article 26 APD.

The recast RCD, applicable to all third-country nationals and stateless persons who make an application for international protection on the territory of a Member State, contains an elaborate framework for the detention of asylum seekers. In the first place, just like all the other instruments of EU law, it determines that detention can only be used when it proves necessary, on the basis of an individual assessment of each case, and if other less coercive measures cannot be applied effectively.[18] The obligation to consider alternatives is specified by requiring states to ensure that they have rules in their national law concerning alternatives to detention, such as a reporting obligation or the deposit of a financial guarantee.[19]

The recast RCD contains a list of five grounds for detention of asylum seekers. In the **first** place, they may be detained in order to determine or verify their nationality or identity. The **second** ground somewhat puzzlingly states that detention can be applied "if it proves necessary in order to determine those elements on which the application for international protection is based, which could not be obtained in the absence of detention, in particular when there is a risk of absconding of the

[13] Recital 20 Dublin III, Article 26 Recast APD, and Article 8 Recast RCD. Article 31 of the Convention Relating to the Status of Refugees determines that asylum seekers shall not be penalized for illegal entry and that no other restrictions shall be placed on their movements than necessary.
[14] Article 28 para 2 Dublin III.
[15] Article 2(n).
[16] Article 28 para 2. See also Recital 20.
[17] Article 28 para 3,
[18] Article 8 para 2 Recast RCD.
[19] Article 8 para 4 Recast RCD. See for more about alternatives to detention: Bloomfield, 2016.

applicant." Applicants may also be detained in order to determine whether they have a right to enter the Member State where they apply for asylum, a ground that should be read against the background of the provisions on border procedures in the Recast APD.[20] A **third** ground for detention is when Member States are confronted with an illegally staying third-country national who is already detained in the context of the Return Directive, and who applies for asylum solely in order to delay or frustrate the removal. In the **fourth** place, applicants can be detained when public order or national security require their detention. The **fifth** and final ground for detention refers to Dublin III: it concerns those who are subject to a transfer procedure, as discussed above.

Except for the third and fifth grounds for detention, which relate to other EU law instruments, the list of detention grounds in the recast RCD is almost identical to the list of permissible grounds for detention put forward by UNHCR (UNHCR Executive Committee 1986) and the Committee of Ministers of the Council of Europe (Council of Europe 2003). It is unclear how some of the grounds for detention of asylum seekers relate to Article 5 ECHR. This provision, which guarantees the right to personal liberty, permits the use of detention in immigration procedures only if the detention is used with a view to deportation, or in order to prevent an unauthorized entry.[21] The ECtHR has ruled that, in order to be lawful, detention needs to be closely connected to these specific purposes. Section 5 below addresses the relationship between article 5 ECHR and the grounds for detention in the recast RCD in more detail.

3. ECJ Case Law on Immigration Detention

Before turning to the ECJ case law on immigration detention and the effect of supranational regulation on the domestic level, it may be helpful to touch briefly upon the supranational quality of EU law, and describe how supranational law relates to more traditional regimes of international law, such as the one established by the ECHR. In the words of the ECJ, "the essential characteristics of the [EU] legal order are in particular its primacy over the law of the Member States and the direct effect of a whole series of provisions which are applicable to their nationals and to the Member States."[22] The *doctrine of direct effect* means that individuals can directly rely on rules of EU law within the domestic legal order, independently from national implementation of these rules, while *supremacy* means that in case of conflict between rules of national law and EU law, the latter takes precedence.[23]

While neither of these doctrines are entirely foreign to international law, it has been convincingly argued that these two characteristics, coupled with the organization of judicial power in the EU, have led to a novel legal order, "whereby the Union legislative and administrative branches do not need the intermediary of the member states, as is the default position in general public international law, to reach

[20] Article 31 para 8 and 43 Recast APD. See for more on detention in border procedures: Cornelisse, 2016.
[21] Article 5 para 1 under f ECHR.
[22] Opinion 1/91, Opinion of the Court of 14 December 1991.
[23] Case 26/62, *Van Gend en Loos*, 5 February 1963; Case 6/64; *Flaminio Costa v ENEL*, 15 July 1964.

individuals both as objects and subjects of the law ” (Weiler 2014, p. 98). The organization of judicial power in the EU is special as it is characterized by the *preliminary reference procedure*, a procedure that is different from the organization of jurisdiction by other international courts, including the ECtHR, as each and every court in a Member State may ask the ECJ about the interpretation of a norm of EU law.[24] While the ECJ will give an authoritative interpretation of that norm, it is actually the national court applying it. The cases discussed below are all rulings given by the ECJ in a preliminary reference procedure.

The Return Directive has yielded a considerable body of case law by the ECJ. Crucially, the ECJ has stressed the importance of the principle of proportionality, and of an individual assessment of the necessity of the measure. This is in contrast to the approach of the ECtHR, which has consistently held that detention under Article 5 ECHR, the provision guaranteeing the right to personal liberty, in the context of immigration procedures does *not* need to be a necessary measure, and that there is accordingly no obligation to consider less coercive measures.[25] For a human rights court this is a striking approach to adopt, as the very nature of human rights requires that interferences with these rights be kept to the minimum. To accept that the right to liberty of immigrants can be restricted—even in circumstances where these restrictions are not necessary—fails to recognize that this right counts as a human right. Elsewhere, I have offered an explanation for the reluctance by the ECtHR to treat the right to liberty in the immigration context as a human right, arguing that to take the right to liberty seriously in adjudicating immigration detention would result in constitutionalising the exercise of power whenever based upon territorial sovereignty (Cornelisse 2011a and 2010). The case law by the ECtHR has consequently not been able to significantly alter political and legal practice by a state such as the Netherlands, according to which detention could be used quite indiscriminately, without paying attention to the individual circumstances of each and every case (Cornelisse 2010, p. 24).[26]

The ECJ case law on immigration detention has not replicated the discursive predominance of territorial sovereignty as expressed in the ECtHR case law. That is significant but not unexpected, if only because it would go against the very text of Article 15 of the Return Directive to disregard the proportionality principle. Furthermore, as a supranational court, the ECJ is not inclined to accord the sovereign right to exclude some sort of special status, which had already become apparent from its case law on family reunification (Cornelisse 2011b, p. 943). Also in a more general sense, the principle of proportionality, here understood as a “least restrictive means test” (Sauter, 2013), has pervaded the case law of the ECJ in all areas, and as such it is firmly established as a general principle of EU law.[27]

Thus, in *El Dridi*, where an Italian judge asked the ECJ whether the criminalisation of irregular detention was allowed under EU law, the ECJ unequivocally stated that

[24] Article 177 TFEU. Courts of last instance are *obliged* to ask a preliminary ruling if they are uncertain about the interpretation of a rule of EU law.
[25] ECtHR15 November 1996, *Chahal v The United Kingdom*, No. 70/1995/576/662, and ECtHR 29 January 2008, *Saadi v United Kingdom*, No. 13229/03.
[26] See for example Council of State, 22 January 2008, ECLI:NL:RVS:2008:BC2998.
[27] See for an early elaboration by the ECJ: Case 10/70, *Internationale Handelsgesellschaft*, 15 July 1964, para 12.

Member States "must carry out the removal using the least coercive measures possible." The Directive lies down a step-by-step approach, and according to the ECJ, detention—the most restrictive measure in order to enforce return—is justified only if the enforcement of the return decision in the form of removal runs the risk of being compromised by the conduct of the person concerned. The existence of such a risk needs to be individually assessed. *El Dridi* was the first in a string of cases addressing the conformity with the Return Directive of national criminal law sanctions on illegal stay in the form of imprisonment or home detention. It would go beyond the scope of this paper to deal with this case law in detail, but it deserves to be mentioned here that it has shown the concept of an effective removal policy to be a two-edged sword: it precludes Member States from "[prefacing] the implementation of the return decision, or even the adoption of that decision, with a criminal prosecution which could lead to a term of imprisonment during the course of the return procedure, in so far as such a step would risk delaying the removal."[28] Thus, the Return Directive may prove to be an effective shield against the criminalisation of irregular migration if such criminalisation is predominantly used for symbolic purposes.[29]

In *Kadzoev*, a case concerning detention of a migrant that went beyond the maximum period of 18 months permitted by the Directive, the ECJ stressed another important guarantee for immigration detainees: that the time limits which the Directive puts down are absolute, and when the maximum duration has expired, the third-country national cannot be detained any longer on the basis of the Return Directive.[30] Furthermore, it clarified that detention on the basis of the Directive is not possible on the grounds of public order considerations, a conclusion that seems logical, seeing that detention is to be resorted to with an eye to removal. However, the grounds for detention as codified in the Recast RCD, as we have seen above, sit uneasily with this crucial aspect of the ruling in *Kadzoev*—if irregular immigrants cannot be detained on public order grounds under EU law, it is difficult to see which reasons can justify the fact that asylum seekers can.

It is notable that even during the period before the Recast RCD was applicable—and the grounds for detention of asylum seekers had accordingly not yet been harmonized in the Member States—the ECJ stressed the importance of the principle of proportionality and an individual assessment when detaining asylum seekers. In *Arslan*, a case concerning an irregular migrant who had been arrested by the Czech border police and placed in detention under the Return Directive, after which he applied for asylum, the ECJ addressed the relationship between the Return Directive and EU asylum law.[31] It pointed out that the Return Directive does not apply to persons who have applied for asylum in one of the Member States, as they cannot be regarded as illegally staying in that Member State. However, this does not mean that the return procedure is terminated in such a case, as it may continue if the application for asylum is rejected. Here again, the ECJ brought the effectiveness of the Directive into play, stating that its effectiveness would be undermined if an

[28] Case C-290/14, *Celaj*, 1 October 2015, para 26, Case C-61/11 PPU, *El Dridi*, paragraph 59; Case C-329/11, *Achughbabian*, paras 37 to 39 and 45; and Case C-430/11, *Sagor*, para 33.
[29] The shielding function has its limits, for example if it concerns re-entry of a third country national in violation of an entry ban. See Case C-290/14, *Celaj*.
[30] Case 357/09 PPU, *Kadzoev*, 30 November 2009.
[31] Case C-534/11, *Arslan*, 30 May 2013.

application for asylum would result in the automatic release of someone who had been detained as an illegally staying third-country national. However, according to the ECJ the detention of such a person in these circumstances would be in accordance with EU asylum law only if it appeared that the asylum application was lodged only in order to evade return, and that the detention appeared necessary to prevent such evasion.[32]

In *Mahdi*, a Bulgarian judge asked the ECJ about the extent of judicial control. In this case the ECJ reaffirmed the principle of proportionality in the sense of a least restrictive means test. Thus it made clear that the judicial authority ruling on the lawfulness of detention based on the Return Directive, and on its prolongation after six months, should ascertain whether: other sufficient but less coercive measures than detention can be applied; there is a risk of absconding; and the third-country national concerned avoids or hampers the preparation of his return or the removal process.[33] The question as to whether a risk of absconding exists "must be based on an individual examination of that person's case."[34] In *Mahdi*, the ECJ also emphasized the importance of procedural guarantees: According to the Return Directive, detention must be ordered in writing with reasons being given in fact and in law, and the ECJ ruled that the same requirements apply to the decision to prolong the detention after six months.[35]

4. The Impact of Supranational Regulation in The Netherlands

Since the implementation of the Return Directive, the Dutch judiciary has begun to control the grounds for detention stricter than it did before. In addition, judges have started to address the question as to whether less coercive measures would suffice in a specific case in a more substantial manner. Cases such as *Kadzoev*, *El Dridi*, and *Mahdi* have further bolstered more extensive and substantial judicial control of decisions by the administration to detain. However, at the same time some changes have been largely cosmetic, for example with respect to the extent of deference by the judiciary to the administration. Thus, the Dutch Council of State has seized upon the text of the Return Directive and the *Mahdi* ruling by the ECJ to argue that the judicial control of the question as to whether less coercive measures could be applied should be *full*, i.e. the judge should be able to substitute his judgment for that of the administration.[36]

In reality, however, the control provided by the Council of Sate still leaves a large amount of discretion to the administration. This is so because it confuses judicial control of the grounds for detention and of the question whether detention poses an excessive burden to the individual on the one hand, with a "less restrictive means test" on the other (Cornelisse 2015).[37] Nevertheless, there have been substantial changes: the number of detained individuals has been decreasing steadily since 2011, for a large part due to the fact that the administration takes the obligation to

[32] *Arslan*, para 63.
[33] Case C-80/14, *Mahdi*, 5 June 2014, paras 61 and 62.
[34] Id., para 70.
[35] Id., para 44.
[36] Council of State 23 January 2015, ECLI:NL:RVS:2015:232.
[37] See for example Council of State, 10 September 2015, ECLI:NL:RVS:2015:2951.

consider alternatives more seriously than it did before the Return Directive became applicable (Advisory Committee on Migration Affairs, 2013; Ministry of Security and Justice 2015). In addition, in 2012, a number of pilots have commenced with regard to alternatives for detention (Ministry of Security and Justice 2013).

An area where the constitutionalising influence of EU law has so far remained small is the detention of asylum seekers who arrive in the Netherlands from outside the EU. In the initial decision to detain these individuals in a border procedure, no attention is paid to the requirements of the Recast RCD, such as "a less restrictive means test" (Cornelisse 2016). However, current litigation in the Netherlands is addressing precisely this question, so changes—even if they are incremental—may be imminent.

There are two fields in which the impact of EU law has been significant. The first has been mentioned above, and concerns the grounds for detention. In Dutch law, *Kadzoev* has been of particular importance, seeing that public order grounds, such as petty theft, commonly used as a basis for immigration detention *before* the Return Directive became applicable, may no longer serve as a ground for detention in themselves. These can be put forward as a justification for detention *only* if these grounds can justify the conclusion that someone avoids or hampers removal or if a risk of absconding exists.[38] In a similar vein as with regard to the limits its sets to the criminalisation of irregular stay, the Return Directive in this area thus impedes Member States from conflating the measures that deal with crime on the one hand, and irregular migration on the other.

Also in a general sense, there is more thorough judicial scrutiny of the grounds of detention in deportation proceedings since the Return Directive became applicable. This tendency has perhaps emerged sharpest with regard to detention in Dublin procedures. Before Dublin III became applicable, the sole fact that someone was subjected to a Dublin procedure would be enough to justify the conclusion that a risk of absconding existed, and thus provide sufficient ground for detention in Dutch law. The novel concept of a *significant risk* in Dublin III has led the legislator to make changes in formal regulation, requiring more stringent justification of the use of detention.[39] Moreover, case law shows that the grounds for detention in Dublin procedures are controlled much stricter than before.[40] In addition, Dublin III has caused the Council of State to declare two provisions of Dutch law invalid. These provisions specified two grounds for detention in Dublin procedures that were widely used by the administration in the past: the fact that the third-country national concerned had not departed the Netherlands on his own initiative and the fact that he had made clear that he was not willing to do so. These grounds for detention, according to the Council of State, are not in accordance with the system that Dublin III establishes, according to which it is the responsibility of the Member States to organize the transfer.[41]

[38] Council of State, 21 March 2011, ECLI:NL:RVS:2011:BP9284.
[39] Article 5.1a and 5.1b Aliens Decree.
[40] Council of State, 17 June 2014, ECLI:NL:RVS:2015:2367.
[41] Council of State 30 July 2015, ECLI:NL:RVS:2015:2537.

The second area where the constitutionalising influence of EU law has become clearly visible is with regard to the stringent requirements the judiciary now sets to the motivation by the administration of the decision to detain: it should contain an elaborate reasoning which addresses all requirements for a lawful deprivation of liberty as set down by the various instruments of EU law.[42] This has led to a fundamental change in administrative practice, which previously consisted largely of ticking some boxes on a form. Strikingly, the fact that the ECtHR has required such elaborate reasoning since many years has had no impact on administrative practice in the Netherlands.[43] In contrast, the judgment by the ECJ in *Mahdi* resulted almost immediately in a major change in administrative and judicial practice.[44] The requirement of reasoned decision-making is a crucial first step in making the exercise of public power accountable and open to political and legal contestation.

5. Constitutionalisation between Complementarity and Inconsistency

As mentioned before, the impact of EU law on the constitutional protection of immigration detainees in the Netherlands has been more direct and tangible than that of the ECtHR, at least when it comes to an individual assessment of the grounds for detention, the "lesser means" test, and the requirements for clear and reasoned decision-making. However, before wrapping up my contribution, the interaction between the two legal systems needs to be addressed briefly as well. Crucially, the dynamics between them may result in increased protection for immigration detainees. Nevertheless, at the same time, recent case law by the ECJ has shown that such increased protection is not self-evident: Instead of contributing to complementarity, there is the risk of conflicting interpretations of the lawfulness of detention in the two legal orders. Before turning to the risk of inconsistency below, two examples will flesh out the potential for increased protection.

In the first place, the previous approach by the ECtHR, maintaining that detention in the immigration context need not be a necessary measure under Article 5(1)(f) ECHR, can no longer hold with respect to the EU Member States. More specifically, if these states are resorting to detention without explicitly elaborating upon the less coercive measures they have considered before detaining an individual, and upon the precise reasons why these less coercive measures were insufficient, they are not only violating EU law, but *also* Article 5 ECHR.[45] That is so, because this provision makes compliance with domestic (and thus EU law) a requirement for any lawful deprivation of liberty.[46]

A second example that is illustrative for the way in which denser regulation on the transnational level can result in increased protection of the rights for immigration detainees is the interaction between a right to remain for asylum seekers on the territory of the EU Member States, as provided by EU law on the one hand, and the

[42] Council of State 24 December 2015, ECLI:NL:RVS:2015:4063.
[43] ECtHR 20 September 2011, *Lopko and Toure v. Hungary*, No. 10816/10.
[44] See Council of State 31 January 2015, ECLI:NL:RVS:2015:233; Council of State 1 May 2015, ECLI:NL:RVS:2015:1485, and Council of State: 25 May 2015, ECLI:NL:RVS:2015:1786.
[45] ECtHR 2 October 2008, *Rusu v Austria*, No. 34082/02, ECtHR 4 april 2000, *Witold Litwa v Poland*, No. 26629/95, para 79, and ECtHR 25 February 2005, *Enhorn v. Sweden*, No. 56529/00, paras 49 and 55.
[46] ECtHR 25 June 1996, *Amuur v France*, No. 19776/92, para 50.

right to personal liberty in the immigration context protected by Article 5 ECHR on the other. The recast APD provides applicants for asylum the right to remain in the Member States during the procedure in first instance. While this right to remain does not seem to imply a right to enter and remain in the territory of the Member States in each and every case, Member States may only refuse such entry in a limited number of cases when the Recast APD permits them to use a border procedure.[47] This restriction of the exercise of the right to exclude in itself is a significant step towards what I have called the 'constitutionalisation' of migration control (Cornelisse 2016, p. 75). However, such constitutionalisation is even more apparent when we take into account the implications of a right to stay in EU law for the question as to whether the detention of asylum seekers is lawful under Article 5 the ECHR.

Thus, while the detention of asylum seekers in order to prevent them effecting an unauthorized entry is in principle lawful under the ECHR, the ECtHR has also held that when a state has introduced legislation that explicitly authorizes *the entry or stay of asylum seekers, detention for the purpose of preventing an unauthorised entry would be difficult to reconcile with Article 5 para 1 under f ECHR.*[48] Accordingly, the interplay between EU law and the ECtHR means that Member States' use of pre-admittance detention with regard to asylum seekers is considerably restricted, seeing that EU law only permits the denial of a formal right to enter and stay in a limited number of circumstances.

However, precisely the grounds of detention of asylum seekers as codified in the Recast RCD also evoke the possibility of conflict between the legal orders of the EU on the one hand, and the ECtHR on the other.[49] Such a risk was exemplified by a recent judgment by the ECJ.[50] The case concerned an irregularly staying third-country national who had been condemned for a number of criminal offences, and had been served with a return decision and an entry ban. When the third-country national applied for asylum, he could no longer be detained on the basis of the Return Directive.[51] The Dutch authorities based his detention instead on the Recast RCD, which allows the detention of asylum seekers for reasons of public order, as we have seen above. The Council of State asked the ECJ in a preliminary reference procedure how the provision in the Recast RCD, allowing for the detention of asylum seekers on public order grounds, related to Article 5 ECHR. This question was pertinent because EU law provides applicants for asylum with a right to remain in the Member State during the determination procedure. As deportation of asylum seekers during their procedure is prohibited, it would be difficult to maintain that their detention served deportation, which is a requirement for lawful detention under the ECHR.[52]

[47] See Article 2 under p and Article 43 Recast APD. See for a more elaborate discussion of the way in which the Recast APD circumscribes Member states power to refuse entry to applicants for asylum: Cornelisse, 2016.
[48] ECtHR 9 December 2013, *Suso Musa, v Malta*, No. 42337/12, para 97.
[49] Due to constraints of space, I focus here on just one manifestation of conflict. Another instance where the ECJ has ruled with surprisingly little reference to the case law of the ECtHR concerns the right of the immigration detainee to be heard by the authorities before he is detained. See Bruyker and Mananashvili, 2015.
[50] Case C-601/15 PPU, *J.N*, 15 February 2016.
[51] See the discussion of *Arslan* above.
[52] ECtHR 7 June 2011, *R.U. v. Greece*, No. 2237/08, paras 88-96, and ECtHR 25 September 2012, *Ahmade v. Greece*, No. 50520/09, paras 142-144.

The ECJ solves this difficult question by focusing on the particulars of the case, pointing out that the applicant had been served with a return decision *before* he applied for asylum. It stressed the requirement of effectiveness of the Return Directive, and pointed out that a return procedure opened under the Return Directive should not be simply terminated as a result of an application for international protection, and started afresh after that application had been rejected. Instead, it ruled that in that case the removal procedure should be "*resumed at the stage at which it was interrupted*."[53] This was simply required by the obligation of Member States to carry out the removal as soon as possible.[54] It called attention to the fact that the ECtHR has held that the existence of a pending asylum case does not as such mean that the detention of a person who has made an asylum application is no longer with a view to deportation in the sense of Article 5. Indeed, according to the ECtHR, an eventual rejection of that application could open the way to the execution of removal orders previously made. As such, the ECJ concluded that there was no conflict between the protection offered by Article 5 ECtHR and EU law.[55]

While the outcome of the reasoning by the ECJ is technically correct in this specific case, it is unclear how the detention of asylum seekers on the grounds of public order relates to Article 5 ECHR in those cases that *no previous return decision or removal order has been taken*. In that case, the detention cannot be said to be undertaken with an eye to removal as required by Article 5 the ECHR. As a matter of fact, in *A and others v the UK*, a case concerning the detention on the basis of immigration legislation of suspected terrorists who could not be removed from the UK, the ECtHR explicitly held that when deportation is not possible, preventive detention on security grounds is *not* allowed. The ECJ seems to disregard this crucial limitation on Member States' use of detention for purely preventive purposes by the ECtHR case law also in a more general sense. This becomes apparent in the paragraphs of the judgment in which the ECJ assesses the conformity of the relevant provision in the Recast RCD with the right to personal liberty as guaranteed by the Charter of Fundamental Rights of the EU. There it points out that detention that serves the protection of national security and public order genuinely meets an objective of general interest recognized by the EU: "detention of an applicant where the protection of national security or public order so requires is, by its very nature, an appropriate measure for protecting the public from the threat which the conduct of such a person represents."[56] This reasoning however is in direct contradiction with the ruling by the ECtHR in *A and Others v. the UK*. Accordingly, as soon as a Member State brings forward public order grounds in order to detain asylum seekers against whom no previous deportation orders have been taken (and who are not subject to a border procedure), the two legal orders seem to clash, no matter how stringent the ECJ has circumscribed the concept of public order in the other parts of its judgment.[57]

[53] Case C-601/15 PPU, *J.N.*, para 75.
[54] Id., para 76.
[55] ECtHR 22 September 2015, *Nabil and Others v. Hungary*, No. 62116/12, para 38.
[56] Case C-601/15 PPU, *J.N*, para 55.
[57] Id, see para 67.

6. Conclusions

We have seen that the influence of EU law on national decision-making with regard to immigration detention has been more tangible than that of the ECHR. This is apparent with regard to three aspects of Dutch legal practice: the individual assessment of the necessity to detain, the requirement of clear and reasoned decision-making, and the judicial control of these issues. The fact that EU law has had particular impact with regard to these aspects should not be surprising: the principle of proportionality in the sense of a lesser means test is firmly anchored in all the EU legal instruments that provide a basis for the use of immigration detention by the Member States. In addition, the proportionality principle forms part of the general principles of EU. As such, the ECJ could not have adopted the approach taken by the ECtHR, which has shied away from the constitutionalising implications of a less coercive means test.

The centrality of the proportionality principle in EU law, taken together with the fact that the EU legal system is capable of influencing domestic legal systems in an unmediated manner, provide a convincing explanation for the constitutional implications of EU law on the use of detention in the Member States. In that respect, the role of litigation should not be underestimated. The demand for rights as "a bottom-up phenomenon, emanating from and close to, the most immediate stake holders" may be facilitated through the specific characteristics of EU law (Weiler, 2014, p. 96). Indeed, the adoption of the Return Directive, Dublin III, and the Recast RCD has led to a veritable surge in novel litigation strategies in the Netherlands, resulting in significant legal change. Moreover, various NGO's and political parties have seized the new instruments to press for political change. Similar dynamics can be seen with regard to the recast Directives of EU asylum law: Civil society uses these legal instruments to add legitimacy to their demands for political change. Nevertheless, a one-dimensional focus on EU law risks overlooking the potential of ECHR law in mobilizing against and litigating immigration detention in a transnational legal setting. This is not only so when the two legal orders complement each other, but also—and perhaps especially so—when lawyers want to address the more troubling aspects of EU law, such as the detention of asylum seekers on grounds of public order.

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